



SENT VIA EMAIL

January 6, 2013

Charles Hoppin, Chairman
State Water Resources Control Board
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Re: Delta Watermaster's Term 91 Report

Dear Chairman Hoppin:

On December 4, 2012, the Delta Watermaster presented his report regarding Term 91 ("Term 91 Report") to the State Water Resources Control Board ("State Water Board" or "Board"). As reflected by the comments from stakeholders and State Water Board members in response to Mr. Wilson's presentation, the limitations of Term 91 are not well understood.

What Term 91 is:

Term 91 is a specialized solution developed to resolve the specific water right priority problem caused by the settlement of responsibility for meeting water quality objectives. In 1978, the State Water Board developed Term 91 as an interim solution to resolve protests to its implementation of the Water Quality Control Plan through D-1485, which required the Department of Water Resources ("DWR") and the United States Bureau of Reclamation ("USBR") to release water to meet water quality objectives. The protests were based on water right priority issues and Term 91 allowed the State Water Board to avoid the process of determining the relative seniority of each water right holder in the system and assigning responsibility for the water quality objectives in order of water right priority. Thus, D-1485 required upstream water right holders to supplement the natural flow with stored water releases to meet water quality objectives. Downstream water right holders do not have the right to divert water stored and released to meet water quality control objectives. However, prior to Term 91, there was no mechanism to prohibit downstream junior water users from diverting natural flow – even when upstream senior right holders were releasing water to meet objectives. If such junior diversions were allowed to continue unabated, one of two problems would result: either senior upstream water right holders would be required to release more water or the water quality objectives would not be met. Thus, Term 91 was developed to restrict junior downstream water users from diverting natural flow in times where upstream senior water right holders release water to meet water quality objectives.

What Term 91 is Not:

As explained above, Term 91 is a specialized solution to resolve the specific priority conundrum resulting from a settlement in which senior water right holders agreed to be responsible for meeting water quality objectives. Term 91 is not a method or tool that can be used more broadly. Without an existing agreement or settlement from senior water right holders, the State Water Board is required to allocate the responsibility to meet water quality objectives in compliance with water right priority rules, i.e. curtail all junior water right holders before requiring senior water right holders to release water to meet water quality objectives. When responsibility is allocated in this manner, junior water right holders would be prohibited from diverting before senior water right holders and a Term 91 solution is not necessary. Thus, the Term 91 Report's recommendations to enlarge or apply Term 91 more broadly should not be followed.

Application to the Current Review of Water Quality Objectives – Phase 1:

Although the recommendations in the Term 91 Report lack support, the Term 91 Report raised several water right issues the State Water Board will need to address in its Phase 1 program of implementation.

System Demand

In order to determine the quantity of water that will remain instream for the beneficial use of fish and wildlife, the State Water Board must understand how much water is being taken out of the system – or system demand. Although the State Water Board may have information regarding diversions made pursuant to water permits and licenses, there are many diversions in the Delta made pursuant to claims of pre-1914 and riparian water rights. The State Water Board must understand not only the quantity of these claimed diversions, but also the season and timing of these diversions.

The State Water Board created the flow requirement at Vernalis to benefit salmon smolts in their migration through the south Delta to the Bay. (D-1641.) Thus, in its review of the flow objective, it is imperative for the State Water Board to understand the amount of San Joaquin River water that makes it through the Delta. For example, in 2002, the San Joaquin River had a base flow of approximately 2,600 cfs at Vernalis. The San Joaquin River tributaries released water which increased the spring pulse flow to approximately 3,200 cfs. However, in 2002, Delta exports were 1,500 cfs and diversions in the Delta were approximately 1,200-1,800 cfs. Therefore, downstream demand was approximately 3,000 cfs and the total flow was only 3,200 cfs. Because the downstream diverters continued to divert unabated, little to no San Joaquin River water made it through the Delta.

The continued diversions of downstream diverters during upstream releases caused two problems: (1) violation of water right priority – some of the downstream diverters were junior water right holders and continued to divert, despite the curtailment by upstream senior water right holders, and (2) the identified beneficial use (salmon smolt migration) was not receiving water released for its benefit.

In 2002, VAMP was in place and the senior water right holders on the tributaries agreed to forego asserting their rights. There is no similar agreement in place for the Phase 1 review of the water quality objectives. Therefore, in the Phase 1 process, the State Water Board must understand and

account for the impact of system demand. The SJTA has not yet seen evidence that the State Water Board has performed the fact finding or analysis necessary to evaluate the impact of system demands from the San Joaquin River.

System Hydrology

In order to determine whether San Joaquin River flows will provide benefit to fish and wildlife, the State Water Board must understand the hydrology of water released from the San Joaquin River. Hydrologic modeling recently presented to the State Water Board indicated that very little, if any, San Joaquin River water makes it through the Delta. Instead, the vast majority of the water is diverted in the Delta or exported at the project facilities.

This hydrologic information suggests the State Water Board may need to address the following potential problems: (1) whether water intended for in-Delta and through-Delta fish benefits is able to achieve the intended benefit, (2) whether San Joaquin River water is being exported pursuant to a valid water right, and (3) whether the exchange contract is being violated, i.e. whether the Bureau is providing the exchange contractors with Sacramento River water or exported San Joaquin River water. The modeling presented by the DWR in Workshop III would seem to indicate that very little Sacramento River water is being diverted at the Jones Pumping Plant. The State Water Board must understand the hydrodynamics of the system to determine the extent to which San Joaquin River water contributes to beneficial uses in and through the Delta. The SJTA has not yet seen evidence that the State Water Board has performed the fact finding or analysis necessary to evaluate the impact of system hydrology on the San Joaquin River.

System Priority

In D-1641 the State Water Board determined there was not sufficient inflow to meet system demands. In the current Phase 1 process, the State Water Board is proposing to increase instream flow requirements, leaving even less water to meet the demands on the system. In order to allocate responsibility for meeting the flow requirements, water priority rules require the State Water Board take different action depending on the timing of required flows. For early spring flows, the State Water Board must identify junior water right holders and hold water right hearings to curtail junior water rights in sufficient quantity to meet the proposed flow requirements.

For late spring and summer flow requirements, the State Water Board must take an additional step to address riparian diversions. Although riparians have priority over appropriators to divert natural flow, riparians have no right to divert stored water or return flows. Therefore, the State Water Board must estimate the amount of natural flow in the system and ensure riparians are not diverting stored water. For example, if there is a flow requirement of 1,250 cfs at Vernalis and 750 cfs is coming from the release of stored water or return flows, there is about 500 cfs of natural flow in the system. In this scenario, riparians are limited to correlatively share only the 500 cfs and have no right to divert the released 750 cfs.

As noted above, the State Water Board avoided implementing the 1995 water quality objectives pursuant to the rules of water right priority by adopting settlement agreements. However, unlike 1995, there is no settlement currently proposed in Phase 1. Without such a settlement, senior water right

holders on the tributaries will not bypass their rightful diversions or release their previously-stored water while junior appropriators and/or riparians continue to divert unabated. Therefore, the State Water Board must understand the water right priority of the water right holders on the San Joaquin River. The SJTA has not yet seen evidence that the State Water Board has performed the fact finding or analysis necessary to determine water right priority on the San Joaquin River.

Conclusion

The SJTA has not yet seen evidence that the State Water Board has performed the fact finding or analysis necessary to evaluate the impact of system demands, system hydrology and water right priority on proposed flow requirements from the San Joaquin River. The SJTA requests the State Water Board undertake the necessary fact finding on these issues and include the requisite analysis in its substitute environmental document on Phase 1 of the review of the Bay-Delta Plan.

Very truly yours,

O'LAUGHLIN & PARIS LLP



TIM O'LAUGHLIN

TO/tb

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